

**Bay Delta Conservation Plan
Governance Working Group
Preliminary Draft Recommendations for Governance Structure**

Co-Chair's Mark
February ~~16~~23, 2009

This draft ~~5 incorporates~~6 accepts the Feb. 16 redline, which implemented the Governance Workgroup's Feb. 4th and Steering Committee's comments on the Feb. 3rd prior drafts.

This draft 4. ~~The workgroup will continue~~reflects the Co-chairs' recommendations on open issues (as bracketed in prior drafts), for discussion on these provisions and adaptive management, over the next few weeks, with an emphasis at our Feb. 24 meeting. This draft reflects our recommendation that the Workgroup seek now to provide clearer direction on {bracketed topics}- such open issues, understanding that each member reserves the right to qualify, or change, such direction as the rest of the plan matures. As a matter of form, we have also sought to (i) better recognize the many statutes applicable to the plan and (ii) break dense concepts into component elements.

Permittees

1. ~~A permittee under~~ The Bay Delta Conservation Plan will be the basis for permits authorizing permittees to take listed species of fish and wildlife, and cause other environmental impacts, incident to Delta water operations and related covered activities. The permittees are those entities who will be legally responsible for compliance with the permits, including the conditions requiring implementation.
 - 1.1. ~~A primary purpose and use of the plan will be compliance with the Endangered Species Act (ESA) section-), California Endangered Species Act (CESA), and Natural Community Conservation Planning Act (NCCPA). A permittee will be: (i) a non-federal entity authorized under ESA section 10(a)(1)(B), the NCCPA section 2835, and California Endangered Species Act (CESA) CESA section 2081-is, or (ii) the non-federal entity authorized to incidentally take listed species for covered activities subject to the conditions stated in the BDCP.-under~~ ESA section 7(a)(2) provides the basis for incidental take authorization for a federal entity. We use the term “~~), to take endangered or threatened fish and wildlife species incident to water operations and other covered activities, subject to the plan conditions.~~”¹

¹ USBR representatives have stated that “permittee” is not an accurate description of USBR’s status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.

- 1.2. A permittee² to refer to will also be the entity that receives authorized to cause other environmental impacts incident to covered activities, under other applicable environmental statutes. These include: California Water Code sections 1000 *et seq.* (water rights), Water Code sections 13000 *et seq.* (water quality), California Fish and Game Code sections 1600 and 5900 *et seq.* (fish screens, channel modification), and Clean Water Act section 404 (dredge and fill).
 - 1.2.1. A separate permit will likely issue under each such incidental take authorization under any statute.
 - 1.2.2. The Governance Workgroup anticipates that the plan will be designed to comply with the statutes listed in point 1.1 and will be consistent with the permitting obligations described in point 1.2.
- 1.3. Each permittee will have the legal and financial capacities to:
 - 1.3.1. Perform those responsibilities assigned to it by permits. If responsibilities are jointly assigned to several permittees, each will have such capacity.
 - 1.3.2. Remedy inadequate (including untimely or ineffective) performance of the foregoing regulatory processes for all or a portion of the BDCP plan as permitted.
 - 1.3.3. Respond to changed circumstances that affect plan implementation.
 - 1.3.4. Modify the covered activities, including water supply operations,² as may be necessary for continuing compliance with applicable laws.
2. California Department of Water Resources (DWR) will be a permittee under Endangered Species Act (ESA) section 10(a)(1)(B) and NCCPA section 2835. [This is a preliminary recommendation. The Governance Workgroup continues discussion of the alternatives described in point 2.3.]

² ~~USBR representatives have stated that “permittee” is not an accurate description of USBR’s status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.~~

~~The plan activities will also require permitting under laws other than ESA, CESA, and NCCPA. These include: California Water Code sections 1000 *et seq.* (water rights), Water Code sections 13000 *et seq.* (water quality), California Fish and Game Code sections 1600 and 5900 *et seq.* (fish screens, channel modification), Clean Water Act section 404 (dredge and fill), and so forth. [The Governance Workgroup will continue to discuss how to design governance that will comply with all permitting requirements applicable to plan implementation.]~~

- 2.1. The State of California, through DWR, will construct and own the new conveyance facility.
 - 2.2. Under ~~existing~~ authority, DWR constructed and owns the State Water Project's (SWP) existing Delta facilities, including the Banks Pumping Plant. It will seek and obtain permits to continue to operate such facilities in compliance with applicable environmental laws.
 - ~~2.3. The plan will specify whether DWR will be the sole state permittee for the purpose of operating the new conveyance facility, or joint with another entity. [As reflected below, Governance Workgroup continues to discuss (i) whether DWR will be the sole state permittee, or whether some other public entity under state law (e.g., JPA of contractors and DWR) may be a joint or alternative permittee for this purpose; and (ii) whether the permit responsibility for operations will run to the same or different entities that have construction responsibility.]~~
 - ~~2.4. A Joint Powers Authority (JPA) will be established by the SWP and CVP Contractors. [The SWP and CVP Contractors and DWR continue to discuss whether DWR will be invited to be a member of the JPA, and whether the JPA itself may be a permittee. They expect to report back to the Governance Workgroup shortly.]~~
- The JPA could assist in implementing habitat conservation measures and other
3. SWP and CVP Contractors will establish a Joint Powers Authority (Contractor JPA) in order to assist with plan implementation.
 - 3.1. The JPA will be a separate permittee, or otherwise will be a supporting entity (receiving coverage under DWR's permits) as described in point 9.
 - ~~2.4.1. The JPA's responsibilities will be contained or reflected in the plan elements.~~
 - 3.2. The JPA could be a permittee under ESA section 10(a)(1)(B), NCCPA section 2835, or CESA section 2081, or it may receive regulatory coverage as specified in the BDCP and its implementing agreement- and permits.
 4. U.S. Bureau of Reclamation (USBR) will ~~receive incidental take authorization under ESA section 7(a)(2).~~ be a permittee.
 - 4.1. USBR will enter into an agreement with DWR to obtain capacity and other rights in the operation of the new conveyance facility.

- 4.2. Under existing authority, USBR -owns Central Valley Project's (CVP) existing Delta facilities, including the Jones Pumping Plant. It will seek and obtain permit authority to continue to operate such facilities in accordance with applicable environmental laws.

Implementing Entities

4. ~~NCCPA section 2820(b) provides: "A natural community conservation plan approved pursuant to this section shall include an implementation agreement that contains [specified elements]." This agreement specifies responsibilities of named entities for plan implementation. Similarly, an incidental take authorization under ESA section 7(a)(2), or a HCP, specifies responsibilities for plan implementation. We use the term "implementing entity" to refer collectively to such entities.~~
5. An implementing entity mayBy March 31, 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether any other entity should be a permittee to undertake water supply operations, or implement other measures, for the conservation of fish and wildlife.
- 4.1. Mirant will be a permittee for the purpose of ~~plan implementation.~~
6. ~~An implementing entity may be a contractor with a permittee, engaged to perform specified tasks in plan implementation. In the latter event, its take authorization is derivative of the permittee's, and the permittee oversees its performance.~~power operations.

DWR Implementing and Supporting Entities

7. Each permittee will be an "implementing entity" responsible to implement covered activities under NCCPA section 2820(b). ~~[As stated in point 3, Governance Workgroup continues to discuss DWR's permit status.]~~2835, ESA section 7(a)(2), ESA section 10(a)(1)(B), or other permitting authorities.
- 5.1. ~~The Contractor JPA may be an implementing entity. The BDCP and the plan, implementing agreement, permits, or some combination, will specify its responsibilities~~
- 7.1. ~~USBR will also have assign specific responsibilities for implementation as specified in the BDCP and associated incidental take authorization. [Governance Workgroup continues to discuss what those responsibilities will be.]~~to each implementing entity.

- 7.2. ~~A Delta Conservancy, if established, may~~ If non-permittees assist the implementing entities (as described in point 9), the permittees will retain regulatory responsibilities for implementation.
- 8. Each permittee will be designated as an implementing entity for the purpose of water operations.
 - 8.1. DWR will be an implementing entity responsible for construction, operation, and maintenance of the new conveyance facility. It will continue to have responsibility for operation and maintenance of the Banks Pump Station and other State Water Project facilities.
 - 8.2. The Contractor JPA may be a permittee and implementing entity as described in point 3.2.
 - 8.3. USBR will be an implementing entity ~~for purpose of~~ responsible for operation and maintenance of the Central Valley Project facilities either directly or by contract.
 - 8.4. As stated in point 5, by March 31, 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether any other entity should be a permittee and implementing entity for water supply operations for conservation of fish and wildlife.
- 9. Entities other than permittees will assist implementing entities for conservation measures such as habitat restoration and management of other stressors.
 - 9.1. The plan, implementing agreement, permit, or any combination will designate each such supporting entity and specify its tasks.
 - 9.2. Each such supporting entity would receive coverage for take of listed species or other environmental impacts, through the permittee's regulatory authorization.
 - 9.3. A permittee will oversee each such entity's performance of its responsibilities for plan implementation. The permittee will have authority to terminate such entity's responsibilities, if the entity does not perform adequately.
 - 9.4. Designation of a supporting entity will be a function of its jurisdiction, expertise, or other practical capacity to increase the likelihood of timely and successful plan implementation.

10. Supporting entities for the purpose of habitat conservation measures. ~~[The Governance Workgroup continues to discuss how to structure relationship between permittees and Delta Conservancy.]~~ and management of other stressors will include:
 - 10.1. ~~In any event,~~ Delta Conservancy, if established as proposed by Delta Vision. The Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for such implementation of specified measures in BDCP.
 - ~~7.2. Permittees will have authority to terminate Delta Conservancy's responsibilities under the implementing agreement, if they conclude that its performance does not comply with the plan or otherwise is insufficient. [Governance Workgroup will discuss further consequence of non-performance related to portions of the plan funded by the State or Federal governments.]~~
 - 10.2. Other public agencies and private entities ~~may also be implementing entities under the same logic described that~~ have jurisdiction, capacity, and expertise to perform such measures in point 7-a cost-effective, reliable, and timely manner.

BDCP Implementation Council

11. ~~Stakeholders will participate in an Implementation~~ An implementation Council to consult will be formed for the purposes of (i) consulting with the permittees, any other implementing entities, and regulatory agencies in (ii) non-binding dispute resolution between members regarding the implementation of the plan. Both functions will be advisory to the implementing entities.
- ~~10. The plan and implementing agreement will specify eligibility criteria for membership. Such criteria will cover: (i) permittees and any other implementing entities; (ii) permitting agencies; (ii) (in ordinary or ex officio capacity, as they may specify); (iii) other members of the BDCP Steering Committee; (iii; (iv) Delta Counties and other local governments; and (ivv) other stakeholders whose assistance will increase the likelihood of success in implementation.~~
 - 11.1. ~~The Implementation Council will have two functions: consultation and dispute resolution between permittees, implementing entities, and other members. [The Governance Workgroup will continue to discuss the desirability and utility of both functions. As to the first, how should consultation occur to assist (rather than conflict with) (i) permittees' obligation to perform timely and (ii) regulatory agencies' authorities to assure compliance with take authorizations? As to the second function, how should non-binding dispute resolution be structured (i) to have a~~

~~reasonable prospect of success and (ii) advance, not prejudice, the interests of the participants? Generally, the workgroup will continue to discuss whether these functions would add value to plan implementation, and if so, how to optimize such value.]~~

- 11.2. The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entities to timely implement permit obligations. These procedures may vary by plan element.
- 11.3. Such procedures will fully preserve the existing authorities of any member, including implementing entities and regulatory agencies, to act as required by such authorities. ~~The agencies~~These entities will not delegate any such authorities to the Implementation Council.
- 11.4. Such procedures will comply with applicable requirements of open meeting laws.
12. The implementing ~~entity(ies)~~entities will periodically report to and otherwise consult with other council members on (i) past activities and (ii) upcoming plans, including (i) for water supply operations, (ii) habitat restoration, (iii) strategies for other stressors, and (iv) conservation measures, and adaptive management. ~~They~~
 - 12.1. Such consultation will ~~consider member's~~permit the implementing entities and other members to exchange information, comments and recommendations.
 - 12.2. The ~~plan will establish, and the Implementation~~purpose of such consultation is to maximize mutual understanding of plan implementation and minimize risk of disputes.
13. ~~The~~ Council will use, non-binding procedures for dispute resolution ~~between the permittees and council members. Such disputes will concern sufficiency~~related to adequacy of plan implementation, including the performance of adaptive management.
 - 13.1. Such procedures will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while fully reserving each ~~council's members~~council member's legal rights ~~related to such litigation.~~
 - 13.2. Dispute resolution procedure will apply proactively. Thus, if the plan provides that an operational decision will be made on a seasonal basis, the procedure will apply in advance of that season. If an operational decision

will be made on a daily or other real-time basis, the procedure will concern the implementing entity's approach to such decisions (e.g., how is it interpreting applicable criteria?), rather than any particular day's decision.

Assurances for Plan Implementation and Permit Compliance

14. The implementing entities will implement the plan as approved in the permits.
 - 14.1. The plan will contain procedures for routine and non-routine adaptive management of its conservation measures. See Feb. 24th Handout 5. These procedures will specify: (i) triggers for such potential changes, (ii) substantive criteria which the implementing entities will apply, and (iii) permitting agencies and other entities with whom the implementing entities will consult.
 - 14.2. The plan will contain flow measures for conservation of listed fish and wildlife. The Governance Workgroup expects that some such measures will be variable by water year-type, season, or a real-time basis. The plan will specify effective procedures for such variable flows, including (i) triggers, (ii) substantive criteria, and (iii) obligations for consultation or approval.
15. The plan will be enforceable and enforced under the permitting statutes listed in points 1.1 – 1.2.
 - 15.1. The plan will be a condition of each permit issued for covered activities.
 - 15.2. Each permit for water operations will be subject to enforcement under the California Water Code, with respect to water rights and water quality impacts. This statute applies to all permittees regardless of legal status as a federal or non-federal entity. Other statutes, such as the ESA, will apply differently to permittees, depending on federal status.
 - 15.2.1. It is our preliminary view that use of the Coastal Zone Management Act, as recommended by the Delta Vision Task Force, is not necessary to assure adequacy or consistency of plan implementation by federal and non-federal permittees.
 - 15.2.2. It is our preliminary view that existing statutes, as listed in points 1.1 – 1.2, provide sufficient regulatory authority to assure plan implementation as a condition of permits issued under those statutes.
 - 15.3. Each permit will recognize that the covered activities, including water operations, are governed by other permits. Each permit will provide for integrated approach to compliance with the several permits, such as routine

coordination between the permitting agencies regarding the status of plan implementation, while recognizing that each permitting agency has independent statutory authority.

15.4. Plan modification will require amendment of all applicable permits.

16. By March 31, 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether permit obligations for performance of conservation measures should be reinforced by contracts, water or property rights, or other non-permit assurances held and enforced by non-permittees.

Coordinated Governance

17. The plan will contain appropriate provisions to reconcile this governance of plan implementation with overall governance of Delta natural resources that may be established pursuant to the recommendations of Delta Vision Task Force or otherwise.

17.1. Each permit under the statutes listed in points 1.1 – 1.2 will be enforced by the permitting agency.

17.2. Coordination between any regional government and the permitting agencies will thus concern matters outside of permit compliance.

18. By separate agreement, ~~the permittees, other Steering Committee members,~~ concurrent with plan adoption, the permittees and other stakeholders ~~may will~~ agree to provisions ~~for coordinated~~ to help advance effective regulation of third parties whose facilities and activities affect achievement of plan goals ~~and objectives.~~ or performance of plan responsibilities in the Delta watershed.

18.1. The agreement will seek to assure fair and systematic compliance of such third parties with their obligations under environmental statutes. Examples include obligations to: (i) divert water only pursuant to valid rights or (ii) screen diversions to prevent entrainment.

18.2. The agreement will commit the signatures to seek reforms which will enhance the effectiveness of the permitting agencies to assure that the permittees and third parties alike comply with their respective obligations under these statutes. Examples include: (i) use of Administrative Law Judges before the State Water Resources Control Board to hear water rights disputes on timely basis; or (ii) authority of the California Department of Fish and Game to issue administrative orders for compliance with screening or similar obligations.